IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA 45/23 & JA 25/23

In the matter between:

YOVANKA TORRENTE **First Appellant**

YOVANKA TORRENTE AND ASSOCIATES INCORPORATED **Second Appellant**

and

GRANT MONAGHAN AND ASSOCIATES INCORPORATED **Respondent**

Heard: **01 November 2023**

Delivered: **23 January 2024**

Coram: **Waglay JP, Mlambo JA *et* Davis AJA**

JUDGMENT

DAVIS AJA

Introduction

[1] This appeal concerns the question as to whether a restraint of trade clause should not have been enforced in that the respondent did not possess any legitimate

protectable interest which justified a restraint of a former employee and accordingly, the applicable restraint clause was contrary to public policy.

[2] This argument failed before the court *a quo* in that an application for the enforcement of the restraint of trade agreement was upheld and the following order was issued:

> 'For the period of a year from 10 February 2023 to 9 February 2024, the first and second respondents are interdicted and restrained from conducting business closer than the radius of 27 km from the applicant's business premises and from employing any employees of the applicant.
>
> The first and second respondents are interdicted and restrained from directly or indirectly including; soliciting and enticing away any employees, agents or any persons that are customers or suppliers of the applicant.
>
> There is no order as to costs.'

[3] It was against this order that the appellants approached this Court on appeal.

The factual background

[4] The respondent was registered as a medical orthotic, prosthetics and podiatry practice. The respondent commenced practice in 2013, attending to the manufacturing of orthotics, prosthetics and podiatry devices for patients as advised by referring doctors. Its head office is situated in Sandton but it also has operational offices in Parkwood and Mayfair.

[5] The respondent's practice deals with upper and lower limb prosthetics, "*off the shelf*" and custom-made orthotic devices for the entire body as well as the servicing of in and outpatients. According to Mr Monaghan, who deposed to the founding affidavit:

> 'The applicant developed methods of engaging with its patients and referring doctors at great economic expense to it over its years in business and these close relationships are an integral part of the applicant's ability to provide its services

and compete in the orthotics and prosthesis industry. The relationships ensure an in-depth knowledge of the business, structures, resources, working methods and expectations of patients.'

[6] The first appellant (appellant) approached the respondent during 2017 and asked to be employed as a student intern in order to be trained to be a proficient practitioner. After qualifying in 2017, the appellant was employed by the respondent as a qualified orthotist and prosthetist. According to the respondent, training, which was provided to the appellant amounted to a cost of approximately R 1.5 million. The applicant was then employed by the respondent as a medical orthotist and prosthetist as from 2 January 2018.

[7] Of relevance to this dispute is her contract of employment and specifically the following clauses:

'1. (20) Confidentiality: You must not during your employment or thereafter, regardless of the reason for the termination of the employment, communicate or divulge to any unauthorised person any confidential matter or information relating to the business affairs, process or trade secrets of the employer;

2. (4) Restraint of Trade: By the employee's signature hereto, she undertakes that from the date that her employment is terminated with the company, the employee shall not directly or indirectly at any place within the greater Gauteng, for a period of two years (from termination date of 20 January 2023 to 19 January 2025), whether for her own account or as a principal, employee, agent, partner, representative, shareholder, consultant, advisor, or in any other similar capacity whatsoever in relation to any person, syndicate, partnership, joint venture, corporation or company, and whether of the first respondent's direct or indirect benefit or otherwise, and whether for reward or otherwise, and whether formally or otherwise:

2.1 Be interested in or concerned in any business which is directly or indirectly in competition with the business of the company or its suppliers;

2.2 Canvass, solicit, interfere with the or entice away an employee, patient, agent or any person who is a customer and/or supplier of the company, nor shall the first respondent attempt to do so;

2.3 Supply or make available to any person, any material, service or information that forms part of the business of the company.

[8] The respondent avers that this later clause was important to its business in that the appellant was exposed to its patient database, trade secrets, business know-how and confidential information as from the time of her employment as from 2018.

[9] On 21 December 2022, the appellant resigned with notice from her employment. Her last day of employment was 20 January 2023. According to Mr Monaghan, following her resignation, the respondent investigated her conduct towards the end of November 2022 and December 2022 when certain information became known to the respondent, including a WhatsApp message of 27 November 2022 sent by a patient of the respondent inquiring about when the appellant will be opening her practice in Bedfordview. On 30 November 2022, the appellant submitted a prescribed minimum benefit application to Discovery as the Medical Aid for Master de Bruyn. This application was done under the practice number of the second appellant. The respondent became aware of this submission as at the end of December 2022.

[10] On 15 December 2022, the appellant responded to a patient via email regarding the process to be followed for cranial treatment. The appellant provided her personal number to the patient instead of the number of the respondent. On 19 December 2022, the appellant approached the referring doctor, Dr Pearce, one of the respondent's referring doctors, with regard to a patient to whom she stated that she would have new rooms in Bedfordview, Petervale and Bryanston in January 2023. She also provided a personal link as well as a new booking line with her number. On 19 December 2022, the appellant approached another referring doctor, Dr Halkas with regard to a patient where she stated that she would have new rooms in Bedfordview, Petervale and Bryanston in January 2023. On 1

December 2022, the first appellant requested an administrative staff member of the respondent to follow up on a claim for Master J Reid with a reference number supplied by the appellant. Discovery, as the relevant medical aid, advised the respondent that it had received the application "*for the Practitioner Yovanka Torrente but with a different practice number than that of the (respondent)*". The claim was in the amount of R 81 401.09.

[11] On 21 December 2022, Terrence Garner-Bennett, the other partner of the respondent had a discussion with the appellant when he enquired about the application for Reid during which discussion the appellant confirmed that she had submitted the claim under her registered practice number and that she did so because she needed to "*get financial head start for her practice*". It also appears that between 22 December 2022 and 28 December 2022, further applications were made by the appellant to Discovery, as the relevant medical aid but on behalf of the second appellant.

[12] Mr Monaghan also avers that by opening up the practice of the second appellant, the appellant will continue to utilise to her benefit confidential information obtained during her employment with the respondent in order to gain an unfair advantage as a competitor.

The judgment of the court *a quo*

[13] In upholding the respondent's application Matyolo AJ relied heavily on the following conduct on the part of the appellant while still in the employ of the respondent:

> "1. Received a WhatsApp message enquiring about the date upon which the [appellant] would be opening her new practice in Bedfordview.
>
> 2. The [appellant] submitted a prescribed minimum benefit application, under her practice number, to Discovery for a Mr De Bruyn, a patient of the [respondent].
>
> 3. The [appellant] provided her personal number, instead of the [respondent's] number, to a patient.

4. The [appellant] approached referring doctors informing them that she will have new rooms in January 2023.

5. The [appellant] provided her own practice number to Discovery, a medical aid service provider, in relation to a claim concerning Mr Reid, a patient of the [respondent].

6. The [appellant] submitted claims under her new practice number.'

[14] For these reasons, the learned Judge found that the fact that the appellant had engaged with several patients during the period of her employment with the respondent to inform them of her new practice and had spoken to an employee of the respondent with a view to have her join the appellant's new business; passed information regarding banking details and the practice number of her new practice; and gave addresses of her new practice to fellow professionals and some patients justified the conclusion that the respondent had established a protectable interest in relation to, at the least, potential inducement of customers and employees of the respondent to transfer to the business of the second appellant.

[15] However, in seeking to limit the range of the restraint clause which would then be the basis of the order of the Court *a quo*, the learned Judge found that the appellant's new practice was based in Bedfordview, 27 kilometres from the business of the respondent. This was, in his view, a reasonable distance from the respondent's business and constituted a reasonable geographical restriction as opposed to the wide geographical area which was sought in the application brought by the respondent.

The appeal

[16] On appeal, counsel for the appellant was invited to dispute any of the factual findings which were central to the judgment of the Court *a quo*. He was compelled to accept that he could not advance any plausible argument which would justify this Court from concluding that the factual basis upon which the judgment at the Court *a quo,* and thus the order was based, were incorrect.

[17] The only argument that was raised on appeal was that the Court *a quo* was incorrect to find that the customers and suppliers of the respondent constituted the kind of trade connections which constituted a protectable interest. In counsel's view, a protectable interest relationship only existed when the employee had personal knowledge of and influence over the customers of suppliers of the employer so as to enable her to induce the customer or supplier to follow her to the new employer.

[18] In *Reddy v Siemens Telecommunication (Pty) Ltd*[1], the Court held that a protectable interest can be established on the facts on the basis that the attachment between the employee sought to be restrained and customers of the example are of such a nature that the employee would be able to induce these customers to follow him or her into a new business.

[19] It stands to reason that the question, therefore, with regard to the existence of a protectable interest is fact-based. Much will depend on the employee's duties, frequency of contact with clients, the duration of these contacts, the knowledge of the nature of the business and requirements of clients and the general nature of the relationships which might have been built up between the employee and clients over the period of the employment.[2]

[20] The importance of the fact-based nature of the enquiry is exemplified in a decision of this Court in *Labournet (Pty) Ltd v Jankielshon and another*[3] (*Labournet*). On the facts, the Court found that there was an insufficient basis to reject the employee's denial of having a sufficient attachment to the clients of the appellant. The employee's version in *Labournet* was that he had no reason to possess confidential details or extensive information of any client of his employer and it was not necessary for him to have such information in order to perform his duties.[4]

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[1] [2006] ZASCA 135; 2007 (2) SA 486 (SCA) at para 20.
[2] See: *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541.
[3] [2017] ZALAC 7; (2017) 38 ILJ 1302 (LAC).
[4] *Ibid* at paras 55 – 56.

[21] In general, a Court which is required to evaluate a restraint of trade agreement has also to engage with the reasonableness of the restraint. It is now trite law to note that this enquiry is a value judgment which involves a consideration of a public interest which requires that parties to a contract should comply with their contractual obligations (*pacta sunt servanda*) and the principle reinforced in s 22 of the Constitution of the Republic of South Africa, 1996, namely that every citizen has a right to choose their trade, occupation or profession freely. As stated by this Court in *Ball v Bambalela Bolts (Pty) Ltd and another*[5], a Court seeks to achieve a balance between the respective gravitational pull of *pacta sunt servanda* and s 22 of the Constitution by carefully examining the nature of the activity prevented by the relevant clause, the area of operation of the restraint, and the overall balance of the competing interest between the parties.

[22] In this case, the Court *a quo* correctly crafted a narrow restraint. It is for the duration of one year, which expires on 9 February 2024 and for a restricted area, being that the appellants are interdicted and restrained from conducting business closer than the radius of 27 kilometres from the respondent's business premises and from employing any employees of the respondent. In crafting such an order, it appears that the learned Judge of the Court *a quo* sought to give meaning to the clauses of the employment contract set out in the restraint clause; in particular, the conducting of any business after employment with the respondent was terminated which "*is directly or indirectly in competition with the business of the company or its supplier*". In this case, the conduct of the appellant in and of itself indicates that she had important and valuable connections with patients and employees of the respondent, sufficient to divert them to the business of the second appellant.

[23] By giving due weight to the importance of the freedom of trade and thus the imperative of balancing the restriction contained in the employment contract with the broader public interest encapsulated in the constitutional provision of s 22, the

[5] [2013] ZALAC 14; (2013) 34 ILJ 2821 (LAC) at para 17.

order achieves a balance between the competing interests which suffices to justify the restricted restraint which was the subject of the order of the Court *a quo*.

Conclusion

[24] For these reasons, the appeal against the order of the Court *a quo* of 10 February is dismissed. Although the Court *a quo* did not make an order as to costs, it does appear that having been unsuccessful in the Court *a quo* but now prosecuting an appeal, the appellants should pay costs which costs should follow the result.

[25] Accordingly, the following order is made:

Order

1. The appeal against the order of the Court *a quo* of 10 February 2023 is dismissed with costs.

DAVIS AJA

Waglay JP and Mlambo JA agree.

APPEARANCES:

FOR THE APPELLANTS: Adv. R Bhima

Instructed by Pagel Schulenburg Inc

FOR THE RESPONDENT: Mr C Higgs of Higgs Attorneys Inc